the SEC, lacked the appropriate authority. I believe that the SEC's attempts were well-intentioned, but the court's findings indicate that clearer authority must be established for key sectors of the financial services industry, including hedge funds and company formation agents.

Because hedge funds, private equity funds, and company formation agents are as vulnerable as other financial institutions to money launderers seeking entry into the U.S. financial system, there is no reason why they should continue to serve as pathways into the U.S. financial system for substantial funds of unknown origin. We need to establish a clear statutory mandate for these entities to implement sound anti-money laundering programs and to report on suspicious activities.

Mr. DODD. I appreciate Senator LEVIN's and his subcommittee's hard investigative work on this very difficult subject matter. I share his conviction that America's regulatory system must be reformed to address challenges posed by business practices surrounding 21st century financial products. The United States cannot afford to have investment vehicles used to engage in abusive practices of fraud, illicit activity, and tax evasion. As the Banking Committee undertakes a comprehensive effort to modernize the securities and banking system, I will look forward to engaging the senior Senator from Michigan on issues of particular importance to him, including anti-money laundering measures.

Mr. REID. Mr. President, this housing crisis is the root of our larger economic crisis. As the mortgage mess rapidly worsens—and hurting more hardworking families—the implications for every other part of our economy are disastrous.

Today we learned that the number of American families at risk of losing their homes skyrocketed in the past few months. The problem is significantly worse at the beginning of this year than it was at the same time last year. In Las Vegas alone, 1 in every 22 homes received a foreclosure notice between January and March. That's seven times the national average.

The American people know we must do more. The people of Nevada certainly know this—families in my State lose their homes at the worst rate in the Nation. They know we must act now, before this emergency spins even further out of control.

But the declining health of our housing market comes with serious side effects. As foreclosures rise, so do reports of fraud. According to one report, the Nevada Bureau of Consumer Protection now receives 100 complaints each month from homeowners identifying possible mortgage scams. One Nevada scam recently offered a 100-percent money-back guarantee. The scammer, unsurprisingly, didn't hold up his end of the bargain. Another scheme charged homeowners heavy upfront fee and monthly charges on top of that—only later did they learn they were not getting any services in return.

While we are working to help the millions of desperate homeowners who need to modify their mortgages, countless swindlers are working to take advantage of them. And the way the system works now, we can't keep up.

The mortgage and corporate fraud bill will strengthen our ability to stop those who game the system on the backs of families who play by the rules and make an honest living. It gives law enforcement the necessary tools to probe, prosecute, and punish those responsible for the frauds that exploit hardworking homeowners and endanger our economy.

It is a strong start to solving a critical component of this crisis. But if we are going to protect families, it is not enough to punish the perpetrators—we must also stop the scams before they start. That is what the amendment I have submitted today does.

My Amendment No. 984 complements the larger effort in the underlying bill in three important ways, with each component focusing on the areas where foreclosures are the highest:

First, we will authorize more resources for advertising to help people avoid the mortgage rescue scams that bilk homeowners of thousands of dollars by raising awareness of the problem and encouraging the use of legitimate, free counseling agencies there to help. Because many of these areas have large Latino populations, at least half of those resources will be used for Spanish language advertising.

Second, we will increase resources for HUD-certified housing-counseling agencies in those hardest-hit areas. Las Vegas, Reno and other reeling regions still need more help as this problem gets worse. This amendment will help the agencies staff up and meet the growing demand for their services.

Third, we will send well-trained and experienced HUD officials to further support those agencies and other efforts by the Federal Government to combat the foreclosure crisis and prevent scams.

Hardworking Americans have lost enough in this storm. They need not give thousands of dollars to con artists who will leave them with struggling with the same mortgage and even less money to pay it. They need not be duped into turning over the keys to their home only to be evicted later.

To stabilize the economy, we must build on the administration's and our own prior efforts to stabilize the housing market. To do that, we must start by stopping fraud. Yes, we must put away the swindlers, but we must also do more to stop the vultures before they can prey on the most vulnerable.

I yield the floor and I suggest the absence of a quorum.

The PRESIDING OFFICER. The clerk will call the roll.

The bill clerk proceeded to call the roll.

Mr. BEGICH. Mr. President, I ask unanimous consent that the order for the quorum call be rescinded.

The PRESIDING OFFICER. Without objection, it is so ordered.

AMENDMENT NO. 999

Mr. BEGICH. Mr. President, I ask unanimous consent that the order with respect to a vote in relation to amendment No. 999 be vitiated, that the amendment be agreed to, and the motion to reconsider be laid upon the table.

The PRESIDING OFFICER. Is there objection?

Without objection, the amendment is agreed to.

The amendment (No. 999) was agreed to.

The PRESIDING OFFICER. The motion to reconsider is laid upon the table.

MORNING BUSINESS

Mr. BEGICH. Mr. President, I ask unanimous consent that the Senate proceed to a period of morning business, with Senators permitted to speak for up to 10 minutes each.

The PRESIDING OFFICER. Without objection, it is so ordered.

(At the request of Mr. REID, the following statement was ordered to be printed in the RECORD.)

DEPARTMENT OF JUSTICE OPINIONS ON CIA'S DETENTION AND INTERROGATION PROGRAM

• Mr. ROCKEFELLER. Mr. President, today Chairman DIANNE FEINSTEIN and I, with the agreement of Vice Chairman KIT BOND, have posted on the Web site of the Senate Select Committee on Intelligence, a document newly declassified by the Obama administration. I ask that this document be printed in the RECORD at the end of my remarks.

In so doing we conclude an effort that I began as chairman of the committee in the last Congress to provide to the public an initial narrative of the history of the interrogation and detention opinions of the Department of Justice's—DOJ—Office of Legal Counsel, OLC.

I applaud President Obama's decisive action last week not only to release four of the OLC opinions discussed in our narrative but also to state firmly our Nation's support for the front-line intelligence professionals who relied on that legal advice in good faith. I couldn't agree more.

Three of these OLC documents are among those that I sought for the committee starting as far back as 2005, when it became increasingly clear to me that Congress had not been given complete information regarding the Bush administration's interrogation policies and practices.

I said publicly in July of 2005 and still firmly believe today that secret legal opinions that are kept even from oversight by the Congress can lead to great error. In the years since then I—together with Chairman FEINSTEIN and others—have sought within the committee, on the Senate floor, and in

written demands to the Bush administration to launch a comprehensive investigation of these issues and to advance legislation to end coercive interrogation practices.

Now, thanks to President Obama's wise decision and to the ongoing work of the Senate Intelligence Committee, we have at last begun the task of fully setting the record straight, holding our government accountable, and learning from past errors in order to protect our country into the future.

Let me be clear—in the wake of 9/11 we all wanted to leave no stone unturned in our pursuit of terrorists to prevent future attacks. At that time and since, the Senate Intelligence Committee sought to work in partnership with the administration to keep America safe. But we now know that essential information was withheld from the Congress on many matters and decisions were made in secret by senior Bush administration officials to obscure the complete picture.

It is my hope and intention that the document we release today helps to fill in some of the facts, even as many other pieces of the puzzle are brought forth.

The genesis of this document is as follows:

Last year, I sought declassification of the August 1, 2002, OLC opinion, along with a short contextual narrative to accompany it. While declassification of that opinion was resisted, we engaged instead in a joint effort with Attorney General Michael B. Mukasey to declassify a broader narrative surrounding all of the OLC's opinions on these matters.

The objective was to produce a text that describes the key elements of the opinions and sets forth facts that provide a context for those opinions, within the boundaries of what the DOJ and the Intelligence Community would recommend in 2008 for declassification.

By late 2008, the DOJ, the Director of National Intelligence—DNI—and the Central Intelligence Agency—CIA—all had approved the public release of this narrative, but the Bush Administration National Security Council—NSC—held it and would not agree to its declassification.

I renewed the declassification effort as soon as Attorney General Eric Holder took office in early February 2009, and I am pleased to have received the support again of the DOJ, DNI and CIA, and now also of the NSC, for its release as a contextual description of the OLC memos.

Readers of the narrative should bear in mind that its text is current through President Obama's Executive orders of January 22, 2009, but has not been revised following the release of the four OLC opinions on April 16, 2009. While there is now more public information available about those four opinions, the narrative adds important facts about the approval of the interrogation program beginning in 2002 and about opinions subsequent to the four that have been released.

For the moment, I would like to note three points that emerge from the narrative: First, the records of the CIA demonstrate that the lawyers at the Office of Legal Counsel—OLC—did not operate in a vacuum. Key legal officials at the CIA, NSC, DOJ's Criminal Division, the Office of White House Counsel, all participated in meetings leading to the approval of methods used by the CIA. The then Vice President and the National Security Adviser are at the center of the discussions. But, strikingly, unless there is a further story in records not yet shown to us, the Secretary of State and the Secretary of Defense, were not involved in the decision making process despite the high stakes for U.S. foreign policy and for the treatment of the U.S. military.

Second, the narrative and the May 30, 2005, opinion demonstrate that the Detainee Treatment Act of December 2005, was substantially undermined by the May 30, 2005, OLC opinion. The Bush administration had already construed the main provisions of the act to authorize its full gamut of coercive techniques.

Third, the narrative demonstrates that the job of declassifying the interrogation and detention opinions of the OLC is not complete. There were important opinions in 2006 and 2007 that will, among other things, show how OLC interpreted the Detainee Treatment Act and the war crimes amendments of the Military Commissions Act of 2006, and Common Article 3 of the Geneva Conventions. The prompt declassification of those opinions, accompanied by their withdrawal as valid OLC opinions, is essential to completing the progress achieved by the President's declassification and the Attorney General's withdrawal of four opinions last week.

Finally, I am gratified that the release of the August 2002 and May 2005 opinions, followed by the release of this narrative of the history of OLC opinions from 2002 to 2007, are themselves but first steps.

In this new environment, and with the shared determination of our new chairman, the Senate Intelligence Committee is undertaking a major review not only of the origin of the detention and interrogation program but also of its actual implementation. We will be asking probing questions about what took place during interrogations and what intelligence was gained from detainees. We will also be examining what was told to the Congress, including both the content and the limitations on the briefings that were provided.

It is long overdue but certainly not too late. As we enter a new period committed to openness and change, and bid farewell to the former administration's obscurity and dishonesty, there is the potential for great progress in our intelligence and national security activities.

The trust between the executive branch and the Congress was breached, and the trust and confidence of the American people has been eroded. But I remain confident that if we restore the vital role of the Congress in overseeing our intelligence activities, we can bridge the divide, restore integrity, and get back to the business of lawfully and effectively securing this great Nation.

The material follows:

There being no objection, the material was ordered to be printed in the RECORD, as follows:

OFFICE OF THE ATTORNEY GENERAL,
Washington, DC, April 17, 2009.

Hon. JOHN D. ROCKEFELLER IV,
Senate. Select Committee on Intelligence, Washington, DC.

DEAR SENATOR ROCKEFELLER: This responds to your letter of February 3, 2009, which requested declassification and release of a narrative regarding advice provided by the Department to the Central Intelligence Agency on the legality of the CIA's use of certain interrogation techniques.

As you know, we have worked with Committee staff in reviewing the narrative for this purpose and we are pleased to advise you that this process has now been completed. We are transmitting the now declassified narrative to you with this letter for the further action necessary in order to disclose the document.

We appreciate the leadership that you and the Senate Select Committee on Intelligence have demonstrated on these important issues. We also are grateful for your patience as we have worked through the process leading to this declassification.

Sincerely,

ERIC H. HOLDER, JR.,
Attorney General.

Enclosure.

RELEASE OF DECLASSIFIED NARRATIVE DESCRIBING THE DEPARTMENT OF JUSTICE OFFICE OF LEGAL COUNSEL'S OPINIONS ON THE CIA'S DETENTION AND INTERROGATION PROGRAM

(Senator John D. Rockefeller IV, April 22, 2009)

PREFACE

The release of the following declassified narrative completes an effort that I began last year as Chairman of the Select Committee on Intelligence. The document is an effort to provide to the public an initial narrative of the history of the opinions of the Department of Justice's Office of Legal Counsel (OLC), from 2002 to 2007, on the legality of the Central Intelligence Agency's detention and interrogation program.

In August 2008, I asked Attorney General Michael B. Mukasey to join the effort to create such an unclassified narrative. The Attorney General committed himself to the endeavor, saying that if we failed it would not be for want of effort. Over the next months, Committee counsel and representatives of the Department of Justice, CIA, Office of the Director of National Intelligence, and the office of the Counsel to the President discussed potential text. The shared objective was to produce a text that, putting aside debate about the merits of the OLC opinions, describes key elements of the opinions and sets forth facts that provide a useful context for those opinions, within the boundaries of what the Department of Justice (DOJ) and the Intelligence Community would recommend in 2008 for declassification.

The understanding of the participants was that while the final product would be a Legislative Branch document, the collaborative nature of this process would provide the Executive Branch participants with the opportunity to ensure its accuracy. Before the end

of the year, this process produced a narrative whose declassification DOJ, the DNI and the CIA supported. However, the prior Administration's National Security Council did not agree to declassify the narrative.

I renewed this effort in early February as soon as Attorney General Eric H. Holder, Jr., took office. Except for this preface, some minor edits, and the addition of a final paragraph to bring the narrative up to date as of President Obama's Executive Orders of January 22, 2009, this document is the same as the one that secured support for declassification last year. This declassification, which National Security Adviser James L. Jones effected on April 16, 2009 and Attorney General Holder transmitted to the Committee on April 17, 2009, is supported again by the DOJ, the DNI, and the CIA. Because the text of the narrative was settled prior to the release on April 16, 2009 of the declassified OLC opinions from August 2002 and May 2005, the narrative does not include additional information from those opinions that is now in the public domain.

JOHN D. ROCKEFELLER IV.

OLC OPINIONS ON THE CIA DETENTION AND INTERROGATION PROGRAM

Submitted by Senator John D. Rockefeller IV for Classification Review

On May 19, 2008, the Department of Justice and the Central Intelligence Agency (CIA) provided the Committee with access to all opinions and a number of other documents prepared by the Office of Legal Counsel of the Department of Justice (OLC) concerning the legality of the CIA's detention and interrogation program. Five of the documents provided addressed the use of waterboarding. Committee Members and staff reviewed these documents over the course of several weeks; however, the Committee was not allowed to retain copies of the OLC documents about the CIA's interrogation and detention program.

The Committee had previously received one classified OLC opinion—an August 1, 2002, OLC opinion—in May 2004 as an attachment to a special review issued by the CIA's Inspector General on the CIA's detention and interrogation program. The opinion is marked as ''Top Secret.'' The Executive Branch initially provided access to this review and its attachments to the Committee Chairman and Vice Chairman and staff directors. On September 6, 2006, all Members of the Committee obtained access to the Inspector General's review. The August 1, 2002, opinion is currently the only classified OLC opinion in the Committee's possession as to the legality of the CIA's interrogation techniques.

THE CAPTURE OF ABU ZUBAYDAH AND THE INITIATION OF THE CIA DETENTION AND INTERROGATION PROGRAM

In late March 2002, senior Al-Qa'ida operative Abu Zubaydah was captured. Abu Zubaydah was badly injured during the firefight that brought him into custody. The CIA arranged for his medical care, and, in conjunction with two FBI agents, began interrogating him. At that time, the CIA assessed that Abu Zubaydah had specific information concerning future Al-Qa'ida attacks against the United States.

CIA records indicate that members of the National Security Council (NSC) and other senior Administration officials were briefed on the CIA's detention and interrogation program throughout the course of the program. In April 2002, attorneys from the CIA's Office of General Counsel began discussions with the Legal Adviser to the National Security Council and OLC concerning the CIA's proposed interrogation plan for Abu Zubaydah and legal restrictions on that interrogation. CIA records indicate that the Legal Adviser to the National Security Council briefed the National Security Adviser, Deputy National Security Adviser, and Counsel to the President, as well as the Attorney General and the head of the Criminal Division of the Department of Justice.

According to CIA records, because the CIA believed that Abu Zubaydah was withholding imminent threat information during the initial interrogation sessions, attorneys from the CIA's Office of General Counsel met with the Attorney General, the National Security Adviser, the Deputy National Security Adviser, the Legal Adviser to the National Security Council, and the Counsel to the President in mid-May 2002 to discuss the possible use of alternative interrogation methods that differed from the traditional methods used by the U.S. military and intelligence community. At this meeting, the CIA proposed particular alternative interrogation methods, including waterboarding.

The CIA's Office of General Counsel subsequently asked OLC to prepare an opinion about the legality of its proposed techniques. To enable OLC to review the legality of the techniques, the CIA provided OLC with written and oral descriptions of the proposed techniques. The CIA also provided OLC with information about any medical and psychological effects of DoD's Survival, Evasion, Resistance and Escape (SERE) School, which is a military training program during which military personnel receive counter-interrogation training.

On July 13, 2002, according to CIA records, attorneys from the CIA's Office of General Counsel met with the Legal Adviser to the National Security Council, a Deputy Assistant Attorney General from OLC, the head of the Criminal Division of the Department of Justice, the chief of staff to the Director of the Federal Bureau of Investigation, and the Counsel to the President to provide an overview of the proposed interrogation plan for Abu Zubaydah.

On July 17, 2002, according to CIA records, the Director of Central Intelligence (DCI) met with the National Security Adviser, who advised that the CIA could proceed with its proposed interrogation of Abu Zubaydah. This advice, which authorized CIA to proceed as a policy matter, was subject to a determination of legality by OLC.

On July 24, 2002, according to CIA records, OLC orally advised the CIA that the Attorney General had concluded that certain proposed interrogation techniques were lawful and, on July 26, that the use of waterboarding was lawful. OLC issued two written opinions and a fetter memorializing those conclusions on August 1, 2002.

AUGUST 1, 2002 OLC OPINIONS

On August 1, 2002, OLC issued three documents analyzing U.S. obligations with respect to the treatment of detainees. Two of these three documents were unclassified: an unclassified opinion interpreting the federal criminal prohibition on torture, and a letter concerning U.S. obligations under the Convention Against Torture and the Rome Statute. Those two documents were released in 2004 and are publicly available.

The third document issued by OLC was a classified legal opinion to the CIA's Acting General Counsel analyzing whether the use of the interrogation techniques proposed by the CIA on Abu Zubaydah was consistent with federal law. OLC had determined that the only federal law governing the interrogation of an alien detained outside the United States was the federal anti-torture statute. The opinion thus assessed whether the use of the proposed interrogation techniques on Abu Zubaydah would violate the criminal prohibition against torture found at Section 2340A of title 18 of the United States Code. The Department of Justice released a highly redacted version of this opinion in July 2008 in response to a Freedom of Information Act lawsuit.

The classified opinion described the interrogation techniques proposed by the CIA. Only one of these techniques—waterboarding—has been publicly acknowledged. In addition to describing the form of waterboarding that the CIA proposed to use, the opinion discusses procedures the CIA identified as limitations as well as procedures to stop the use of interrogation techniques if deemed necessary to prevent severe mental or physical harm. Although a form of ''waterboarding'' has been employed on U.S. military personnel as part of the SERE training program, the Executive Branch considers classified the precise operational details concerning the CIA's form of the technique.

The opinion also outlined the factual predicates for the legal analysis, including the CIA's background research on the proposed techniques and their possible effect on the mental health of Abu Zubaydah. The opinion described the information provided by the CIA concerning whether ''prolonged mental harm'' would be likely to result from the use of those proposed procedures. Because the military's SERE training program, like the CIA program, involved a series of stressful interrogation techniques (including a form of waterboarding) the opinion discussed inquiries and statistics relating to possible adverse psychological reactions to SERE training.

The anti-torture statute prohibits an act ''specifically intended'' to inflict ''severe physical or mental pain or suffering.'' The opinion separately considered whether each of the proposed interrogation techniques, individually or in combination, would inflict ''severe physical pain or suffering'' or ''severe mental pain or suffering.'' The opinion also considered whether individuals using the techniques would have the mental state necessary to violate the statute.

The opinion concluded that none of the techniques individually was likely to cause ''severe physical pain or suffering'' under the statute. With respect to waterboarding, the OLC opinion concluded that the technique would not inflict ''severe physical pain or suffering'' because it does not inflict actual physical harm or physical pain. The opinion concluded that, although OLC did not then believe physical suffering to be a concept under the statute distinct from physical pain, waterboarding would not inflict severe suffering, because any physical effects of waterboarding did not extend for the protracted period of time generally required by the term ''suffering.''

The OLC opinion also concluded that none of the techniques would constitute ''severe mental pain or suffering'' as that term is defined under the anti-torture statute. The opinion concluded that under the anti-torture statute, ''severe mental pain or suffering'' requires the occurrence of one of four specified predicate acts, as well as ''prolonged mental harm.'' The opinion interpreted ''prolonged mental harm'' to require harm of some lasting duration, such as mental harm lasting months or years.

With respect to waterboarding, based on information provided by the CIA, the OLC opinion assessed whether it constituted, as a legal matter, one of the four predicate acts under the mental harm component of the anti-torture statute. The opinion concluded that the technique would not cause ''severe mental pain or suffering'' because, based on the U.S. military's experience with the form of 5 waterboarding used in its SERE program, the CIA did not anticipate that

waterboarding would cause prolonged mental harm.

After evaluating the proposed techniques individually, the OLC opinion considered whether the combined use of the proposed interrogation techniques would cause ''severe physical pain or suffering'' or ''severe mental pain or suffering.'' OLC concluded that the combined use of the interrogation techniques would not constitute severe physical pain or suffering, because individually the techniques fell short of and would not be combined in such a way as to reach that threshold. The opinion concluded that OLC lacked sufficient information concerning the proposed use of the techniques to assess whether their combined use might inflict one of the predicate conditions for severe mental pain or suffering. The opinion concluded, however, that even if a predicate condition would be satisfied, it would not violate the prohibition because there was no evidence that the proposed course of conduct would produce any prolonged mental harm.

Finally, the opinion addressed whether an individual carrying out the proposed interrogation procedures would have the specific intent to inflict severe physical or mental pain or suffering required by the statute. It concluded that the interrogator would not have the requisite intent because of the circumstances surrounding the use of the techniques, including the interrogator's expectation that the techniques would not cause severe physical or mental pain or suffering, and the CIA's intent to include specific precautions to prevent serious physical harm.

For those reasons, the classified opinion concluded that none of the proposed interrogation techniques, used individually or in combination, would violate the criminal prohibition against torture found at section 2340A of title 18 of the United States Code.

EVENTS AFTER ISSUANCE OF AUGUST 1, 2002 OLC OPINION

According to CIA records, after receiving the legal approval of the Department of Justice and approval from the National Security Adviser, the CIA went forward with the interrogation of Abu Zubaydah and with the interrogation of other high-value Al-Qa'ida detainees who were then in, or later came into, U.S. custody. Waterboarding was used on three detainees: Abu Zubaydah, Abd alRahim al-Nashiri, and Khalid Sheikh Muhammad. The application of waterboarding to these detainees occurred during the 2002 and 2003 timeframe.

In the fall of 2002, after the use of interrogation techniques on Abu Zubaydah, CIA records indicate that the CIA briefed the Chairman and Vice Chairman of the Committee on the interrogation. After the change in leadership of the Committee in January of 2003, CIA records indicate that the new Chairman of the Committee was briefed on the CIA's program in early 2003. Although the new Vice-Chairman did not attend that briefing, it was attended by both the staff director and minority staff director of the Committee. According to CIA records, the Chairman and Vice Chairman of the Committee were also briefed on aspects of the program later in 2003, after the use of interrogation techniques on Khalid Sheikh Muhammad.

In the spring of 2003, the DCI asked for a reaffirmation of the policies and practices in the interrogation program. In July 2003, according to CIA records, the NSC Principals met to discuss the interrogation techniques employed in the CIA program. According to CIA records, the DCI and the CIA's General Counsel attended a meeting with the Vice President, the National Security Adviser, the Attorney General, the Acting Assistant Attorney General for the Office of Legal Counsel, a Deputy Assistant Attorney General, the Counsel to the President, and the Legal Adviser to the National Security Council to describe the CIA's interrogation techniques, including waterboarding. According to CIA records, at the conclusion of that meeting, the Principals reaffirmed that the CIA program was lawful and reflected administration policy.

According to CIA records, pursuant to a request from the National Security Adviser, the Director of Central Intelligence subsequently briefed the Secretary of State and the Secretary of Defense on the CIA's interrogation techniques on September 16, 2003.

In May 2004, the CIA's Inspector General issued a classified special review of the CIA's detention and interrogation program, a copy of which was provided to the Committee Chairman and Vice Chairman and staff directors in June of 2004. The classified August 1, 2002, OLC opinion was included as an attachment to the Inspector General's review. That review included information about the CIA's use of waterboarding on the three detainees.

After the issuance of that review, the CIA requested that OLC prepare an updated legal opinion that incorporated actual CIA experiences and practice in the use of the techniques to date included in the Inspector General review, as well as legal analysis as to whether the interrogation techniques were consistent with the substantive standards contained in the Senate reservation to Article 16 of the Convention Against Torture.

Article 16 of the Convention Against Torture requires signatories to ''undertake to prevent in any territory under its jurisdiction other acts of cruel, inhuman and degrading treatment which do not amount to torture.'' The Senate reservation to that treaty defines the phrase ''cruel, inhuman and degrading treatment'' as the treatment prohibited by the Fifth, Eighth, and Fourteenth Amendments to the Constitution. Thus, the CIA requested that OLC assess whether the interrogation techniques were consistent with the substantive provisions of the due process clause, as well as the constitutional requirement that the government not inflict cruel or unusual punishment.

In May 2004, after the issuance of the Inspector General review, CIA records indicate that the CIA's General Counsel met with the Counsel to the President, the Counsel to the Vice President, the NSC Legal Adviser, and senior Department of Justice officials about the CIA's program and the Inspector General review.

In June 2004, OLC withdrew its unclassified August 1, 2002, opinion on the anti-torture statute. OLC did not, however, withdraw the classified August 1, 2002 opinion, because it concluded that the classified opinion was narrower in scope than the unclassified opinion that was withdrawn. The classified opinion applied the anti-torture statute to the CIA's specific interrogation methods, but, unlike the unclassified August 1, 2002, opinion, it did not rely on or interpret the President's Commander in Chief power or consider whether torture could be lawful under any circumstances.

In July 2004, the CIA briefed the Chairman and Vice Chairman of the Committee on the facts and conclusions of the Inspector General special review. The CIA indicated at that time that it was seeking OLC's legal analysis on whether the program was consistent with the substantive provisions of Article 16 of the Convention Against Torture.

According to CIA records, subsequent to the meeting with the Committee Chairman and Vice Chairman in July 2004, the CIA met with the NSC Principals to discuss the CIA's program. At the conclusion of that meeting, it was agreed that the CIA would formally request that OLC prepare a written opinion addressing whether the CIA's proposed interrogation techniques would violate substantive constitutional standards, including those of the Fifth, Eighth and Fourteenth Amendments regardless of whether or not those standards were deemed applicable to aliens detained abroad.

DOJ ADVICE FROM JUNE 2004 TO MAY 2005

Following the withdrawal of the unclassified August 1, 2002, opinion in June 2004, OLC began work on preparing an unclassified opinion concerning its interpretation of the anti-torture statute. At the same time, in accord with the request described above, OLC worked on classified opinions that would evaluate the specific techniques of the CIA program, individually and in combination, under its revised interpretation of the anti-torture statute, as well as an opinion that would evaluate whether the program was consistent with the substantive provisions of Article 16 of the Convention Against Torture.

On July 14, 2004, in unclassified written testimony before the House Permanent Select Committee on Intelligence, an Associate Deputy Attorney General explained the Department of Justice's understanding of the substantive constitutional standards embodied in the Senate reservation to Article 16 of the Convention Against Torture. The official's written testimony stated that under Supreme Court precedent, the substantive due process component of the Fifth Amendment protects against treatment that ''shocks the conscience.'' In addition, his testimony stated that under Supreme Court precedent, the Eighth Amendment protection against Cruel and Unusual Punishment has no application to the treatment of detainees where there has been no formal adjudication of guilt.

While OLC worked on drafting new opinions with respect to the CIA program, the CIA continued its interrogation of high-value Al-Qa'ida detainees in U.S. custody. On July 22, 2004, the Attorney General confirmed in writing to the Acting Director of Central Intelligence that the use of the interrogation techniques addressed by the August 1, 2002, classified opinion, other than waterboarding, would not violate the U.S. Constitution or any statute or treaty obligation of the United States, including Article 16 of the Convention Against Torture. On August 6, 2004, the Acting Assistant Attorney General for OLC advised in writing that, subject to the CIA's proposed limitations, conditions and safeguards, the CIA's use of waterboarding would not violate any of those legal restrictions. The letter noted that a formal written opinion would follow explaining the basis for those conclusions. According to the CIA, the CIA nonetheless chose not to use waterboarding in 2004. Waterboarding was not subsequently used on any detainee, and was removed from CIA's authorized list of techniques sometime after 2005.

On December 30, 2004, the Office of Legal Counsel issued an unclassified opinion interpreting the federal criminal prohibition against torture, 18 USC 2340–2340A, superseding in its entirety the withdrawn August 1, 2002, unclassified opinion. That December 30, 2004, opinion included a footnote stating ''While we have identified various disagreements with the August 2002 Memorandum, we have reviewed this Office's prior opinions addressing issues involving treatment of detainees and do not believe that any of their conclusions would be different under the standards set forth in this memorandum.''

In January of 2005, in response to a question for the record following his confirmation hearing, Attorney General Gonzales indicated that ''the Administration . . . wants

to be in compliance with the relevant substantive constitutional standard incorporated in Article 16 [of the Convention Against Torture], even if such compliance is not legally required.'' Attorney General Gonzales further indicated that ''the Administration has undertaken a comprehensive legal review of all interrogation practices. . . . The analysis of practices under the standards of Article 16 is still under way.''

The CIA briefed the Chairman and Vice Chairman of the Committee on the CIA's interrogation program again in March 2005. At that time, the CIA indicated that it was waiting for a revised opinion from OLC.

MAY 2005 OPINIONS

In May 2005, OLC issued three classified legal opinions analyzing the legality of particular interrogation techniques. The first legal opinion analyzed the legality of particular interrogation techniques, including waterboarding, under the interpretation of the federal criminal prohibition against torture set forth in the December 30, 2004, unclassified opinion. The May 2005 opinion includes additional facts about the proposed techniques and a more extensive description of the applicable legal standards than the August 1, 2002, opinion.

With respect to waterboarding, the opinion concluded that while the technique presented a substantial question under the statute, the authorized use of waterboarding, when conducted with measures identified by the CIA as safeguards and limitations, would not violate the federal criminal prohibition against torture. To understand the possible effects of waterboarding, the May 2005 opinion relied on the military's experience in the administration of its form of the technique on American military personnel who had undergone SERE training, while recognizing some limitations with that reliance, such as the expectations of the individual going through the practice. The opinion also relied on the CIA's experience with the use of its form of waterboarding on the three detainees in 2002 and 2003.

The opinion concluded that waterboarding does not cause ''severe physical pain'' because it is not physically painful. It further reasoned that the CIA's form of waterboarding could not reasonably be considered specifically intended to cause ''severe physical pain.'' The opinion also concluded that under the limitations and conditions adopted by the CIA, the technique would not be expected to cause distress of a sufficient intensity and duration to constitute ''severe physical suffering,'' which the December 30, 2004 unclassified opinion had recognized to be a separate element under the federal anti-torture statute. The opinion concluded that waterboarding would not cause ''severe mental pain or suffering'' because OLC understood from the CIA that any mental harm from waterboarding would not be ''prolonged,'' even if it met a predicate condition under the statute.

OLC's second legal opinion issued in May 2005 addressed the legality of the combined use of particular techniques, including waterboarding, under the criminal prohibition against torture. That opinion relied on information provided by the CIA concerning the manner in which the individual techniques were proposed to be combined in the CIA program. After considering the combined use of techniques as described by the CIA, OLC concluded that the combined use of the proposed techniques by trained interrogators would not be expected to cause the severe mental or physical pain or suffering required by the criminal prohibition against torture.

OLC's third legal opinion in May 2005 assessed the legality of particular interrogation techniques under Article 16 of the Convention Against Torture. The Executive Branch had previously concluded that Article 16 does not apply to detainees, such as those in CIA custody, who were held outside territory under U.S. jurisdiction. Nonetheless, as articulated in the January 2005 testimony of the Attorney General, the Executive Branch had decided to comply, as a matter of policy, with the relevant substantive constitutional standards incorporated in Article 16. Because of that policy determination, and because of the CIA's request that OLC address the substantive ''cruel, inhuman or degrading'' standard, OLC analyzed whether a number of interrogation techniques, including waterboarding, would violate the substantive constitutional standards contained in the Senate reservation to CAT.

The May 2005 opinion on Article 16 concluded that the CIA's use of interrogation techniques, including waterboarding, on senior members of al-Qa'ida with knowledge of, or involvement in, terrorist threats would not be prohibited by the Fifth, Eighth or Fourteenth Amendments under the particular circumstances of the CIA program. OLC concluded that with respect to the treatment of detainees in U.S. custody, who had not been convicted of any crime, the relevant constitutional prohibition was the ''shocks the conscience'' standard of the substantive due process component of the Fifth Amendment. Under the ''shocks the conscience'' standard, OLC concluded that Supreme Court precedent requires consideration as to whether the conduct is ''arbitrary in the constitutional sense'' and whether it is objectively ''egregious'' or ''outrageous'' in light of traditional executive behavior and contemporary practices.

To assess whether the CIA's interrogation program was ''arbitrary in the constitutional sense,'' OLC asked whether the CIA's conduct of its interrogation program was proportionate to the governmental interests involved. Applying that test, OLC concluded that the CIA's interrogation program was not ''arbitrary in the constitutional sense'' because of the CIA's proposed use of measures that it deemed to be ''safeguards'' and because the techniques were to be used only as necessary to obtain information that the CIA reasonably viewed as vital to protecting the United States and its interests from further terrorist attacks.

OLC also concluded that the techniques in the CIA program were not objectively ''egregious'' or ''outrageous'' in light of traditional executive behavior and contemporary practice. In reaching that conclusion, OLC reviewed U.S. judicial precedent, public military doctrine, the use of stressful techniques in SERE training, public State Department reports on the practices of other countries, and public domestic criminal practices. OLC concluded that these sources demonstrated that, in some circumstances (such as domestic criminal investigations) there was a strong tradition against the use of coercive interrogation practices, while in others (such as with SERE training) stressful interrogation techniques were deemed constitutionally permissible. OLC therefore determined that use of such techniques was not categorically inconsistent with traditional executive behavior, and concluded that under the facts and circumstances concerning the program, the use of the techniques did not constitute government behavior so egregious or outrageous as to shock the conscience in violation of the Fifth Amendment.

Before the passage of the Detainee Treatment Act, in October of 2005, the Principal Deputy Assistant Attorney General for OLC noted in response to questions for the record: ''[I]t is our policy to abide by the substantive constitutional standard incorporated into Article 16 even if such compliance is not legally required, regardless of whether the detainee in question is held in the United States or overseas.'' Similarly, in December of 2005, both the Secretary of State and the National Security Adviser stated publicly that U.S. policy was to treat detainees abroad in accordance with the prohibition on cruel, inhuman and degrading treatment contained in Article 16.

SUBSEQUENT DEVELOPMENTS IN THE LAW

In December 2005, Congress passed the Detainee Treatment Act (DTA), and the President subsequently signed it into law on December 30, 2005. That Act applied the substantive legal standards contained in the Senate reservation to Article 16 to the treatment of all detainees in U.S. custody, including those held by the CIA. At the time of the passage of the DTA, the Administration had concluded, based on the May 2005 OLC opinion, that the CIA's interrogation practices, including waterboarding, were consistent with the substantive constitutional standards embodied in the DTA.

In June 2006, in Hamdan v. Rumsfeld, the Supreme Court held that Common Article 3 of the Geneva Convention applied to the conflict with Al-Qa'ida, contrary to the position previously adopted by the President. Common Article 3 of the Geneva Conventions requires that detainees ''shall in all circumstances be treated humanely,'' and prohibits ''outrages upon personal dignity, in particular, humiliating and degrading treatment'' and ''violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture.'' At the time of the Hamdan decision, the War Crimes Act defined the term ''war crime'' to include ''a violation of Common Article 3.''

In August 2006, OLC issued two documents considering the legality of the conditions of confinement in CIA facilities. One of the documents was an opinion interpreting the Detainee Treatment Act; the other document was a letter interpreting Common Article 3 of the Geneva Conventions, as enforced by the War Crimes Act. These documents included consideration of U.S. constitutional law and the legal decisions of international tribunals and other countries.

On September 6, 2006, the President publicly disclosed the existence of the CIA's detention and interrogation program. On the same day, the CIA briefed all Committee Members about the CIA's detention and interrogation program, including the CIA's use of enhanced interrogation techniques.

In October 2006, Congress passed the Military Commissions Act (MCA) to set forth particular violations of Common Article 3 subject to criminal prosecution under the War Crimes Act. Specifically, the MCA amended the War Crimes Act to designate nine actions as grave breaches of Common Article 3, punishable under criminal law. Although only these nine violations of Common Article 3 are subject to criminal prosecution, Congress recognized that Common Article 3 imposes additional legal obligations on the United States. The MCA provided that the President has the authority ''to interpret the meaning and application of the Geneva Conventions and to promulgate higher standards and administrative regulations for violations of treaty obligations which are not grave breaches of the Geneva Conventions.''

In July 2007, the President issued Executive Order 13440, which interpreted the additional obligations of the United States imposed by Common Article 3 of the Geneva Conventions. In conjunction with release of that Executive Order, OLC issued a legal opinion analyzing the legality of the interrogation techniques currently authorized for

use in the CIA program under Common Article 3 of the Geneva Conventions, the Detainee Treatment Act, and the War Crimes Act.

The July 2007 opinion includes extensive legal analysis of the war crimes added by the MCA, U.S. constitutional law, the treaty obligations of the United States, and the legal decisions of foreign and international tribunals. The July 2007 opinion does not include analysis of the anti-torture statute but rather incorporates by reference the analysis of the May 2005 opinions that certain proposed techniques do not violate the anti-torture statute, either individually or combined.

In considering ''traditional executive behavior and contemporary practices'' under the substantive due process standard embodied in the Detainee Treatment Act, OLC considered similar sources to those considered in the May 2005 opinion on Article 16. In addition, OLC examined the legislative history of the MCA, which the President had sought, in part, to ensure that the CIA program could go forward following Hamdan, consistent with Common Article 3 and the War Crimes Act. OLC observed that, in considering the MCA, Congress was confronted with the question of whether the CIA should operate an interrogation program for high value detainees that employed techniques exceeding those used by the U.S. military but that remained lawful under the anti-torture statute and the War Crimes Act. OLC concluded that while the passage of the MCA was not conclusive on the constitutional question as to whether the program ''shocked the conscience,'' the legislation did provide a ''relevant measure of contemporary standards'' concerning the CIA program and suggested that Congress had endorsed the view that the CIA's interrogation program was consistent with contemporary practice.

Because waterboarding was not among the authorized list of techniques, the 2007 OLC opinion did not address the legality of waterboarding. OLC therefore has not considered the legality of waterboarding under either of the two provisions that have been applied to the CIA's treatment of detainees since the passage of the Detainee Treatment Act in December of 2005: Common Article 3 of the Geneva Conventions and the War Crimes Act, as amended by the MCA.

PRESENT CIRCUMSTANCES

On January 30, 2008, at a hearing of the Senate Judiciary Committee on Oversight of the Department of Justice, the Attorney General disclosed that waterboarding was not among the techniques currently authorized for use in the CIA program. He therefore declined to express a view as to the technique's legality. The Attorney General also stated that for waterboarding to be authorized in the future, the CIA would have to request its use, the CIA Director ''would have to ask me, or any successor of mine, if its use would be lawful, taking into account the particular facts and circumstances at issue, including how and why it is to be used, the limits of its use and the safeguards that are in place for its use,'' and the President would have to address the issue.

In February 2008, in testimony before this Committee, the CIA Director publicly disclosed that waterboarding had been used on three detainees, as previously described. At that same hearing, the Director of National Intelligence (DNI) testified that waterboarding was not currently a part of the CIA's program, and that if there was a reason to use such a technique, the Director of the CIA and the Director of National Intelligence would have to agree whether to move forward and ask the Attorney General for a ruling on the legality of the specifics of the situation. The Committee also discussed the CIA's interrogation program with those two officials in closed session.

Although waterboarding was no longer a technique authorized for use in the CIA program, and the Attorney General and DNI testified in 2008 that a new legal opinion based on current law would be required before it could be used again, the May 2005 opinions on the legality of waterboarding under the anti-torture statute and Article 16 of the Convention Against Torture (the legal standards subsequently embodied in the DTA) remained precedents of the Office of Legal Counsel at the time of the Attorney General's and DNI's 2008 testimony.

On January 22, 2009, the President issued Executive Order 13491 on ''Ensuring Lawful Interrogations.'' The Executive Order revoked Executive Order 13440, limited the interrogation techniques that may be used by officers, employees, or other agents of the United States Government, and established a Special Interagency Task Force on Interrogation and Transfer Policies to report recommendations to the President. With respect to prior interpretations of law governing interrogation, section 3(c) of Executive Order 13491 directed that, unless the Attorney General provides further guidance, officers, employees, and other agents of the United States Government may not rely on interpretations of the law governing interrogations issued by the Department of Justice between September 11, 2001, and January 20, 2009.●

HONORING OUR ARMED FORCES

CORPORAL DONTE JAMAL WHITWORTH

Mr. BAYH. Mr. President, I rise today with a heavy heart to honor the life of Marine Cpl Donte Jamal Whitworth from Noblesville, IN. Donte was 21 years old when he lost his life on February 28, 2009, from injuries sustained from a vehicular accident near Al Taquddum Air Base in Al Anbar Province, Iraq. He was a member of Combat Logistics Regiment 15, 1st Marine Logistics Group, Marine Corps Air Station of Yuma, AZ.

Donte, a 2005 graduate of Noblesville High School, joined the Marines immediately after graduation, eager to serve his country. While deployed, he commanded supply convoys transporting goods between U.S. military bases in Iraq. Donte was a dedicated basketball fan who always had a smile on his face. Born into a family of marines, he was proud to embrace the tradition and become a member of our country's Armed Forces. Scheduled to return home in March, Donte planned on reenlisting after his tour was complete.

Today, I join Donte's family and friends in mourning his death. Donte will forever be remembered as a loving son, grandson, and friend to many. He is survived by his mother, Carla Plowden; father, Daniel Whitworth; step-father, Kerry McGee; grandparents, Robert and Catherine Williams; and a host of other relatives, friends, and fellow marines.

While we struggle to express our sorrow over this loss, we can take pride in the example Donte set as a dedicated soldier. Today and always, Donte will be remembered by family, friends, and fellow Hoosiers as a true American hero, and we cherish the sacrifice he made while dutifully serving his country.

As I search for words to do justice to this valiant fallen soldier, I recall President Abraham Lincoln's words as he addressed the families of soldiers who died at Gettysburg:

> We cannot dedicate, we cannot consecrate, we cannot hallow this ground. The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract. The world will little note nor long remember what we say here, but it can never forget what they did here.

This statement is just as true today as it was nearly 150 years ago, as we can take some measure of solace in knowing that Donte's heroism and memory will outlive the record of the words here spoken.

It is my sad duty to enter the name of Donte Jamal Whitworth in the official RECORD of the U.S. Senate for his service to this country and for his profound commitment to freedom, democracy and peace. I pray that Donte's family can find comfort in the words of the prophet Isaiah who said:

> He will swallow up death in victory; and the Lord God will wipe away tears from off all faces.

May God grant strength and peace to those who mourn, and may God be with all of you, as I know He is with Donte.

SERGEANT BRADLEY MARSHALL

Mr. PRYOR. Mr. President, today I pay tribute to the life, achievements, and memory of SGT Bradley Marshall of Little Rock, AR. He gave his life on July 31, 2007, defending citizens of the United States and advancing democracy throughout the world.

Sergeant Marshall served in the 2nd Battalion, 377th Parachute Field Artillery Regiment, 4th Brigade Combat Team, Airborne, 25th Infantry Division, Fort Richardson, AK. His bravery on behalf of this Nation is heroic. His service, professionalism and allegiance to this country will continue to serve as the standard bearer for which to honor our great Nation.

Friends and family described Bradley as athletic and fun-loving. He was a loyal and valued member of his church, community, and Nation. As a husband and father, Bradley loved his family greatly and always cherished their time together. His wife of 17 years, Gina Marshall, said of him ''Brad was the love of my life.'' His son Wesley remembers his dad stopping by his room each night to say, ''I love you.'' Tanner, Marshall's other son, put together a slide show presenting hundreds of pictures of his father.

He touched many lives and was respected by everyone that knew him. Bradley was known as the dependable man who made sure things got done in his own quiet way such as cutting the grass at church, remodeling a home for his former high school coach, doing chores around the house, and helping with vacations for the family. Bradley's church named their new Brad Marshall Family Life Center in honor